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No. 08-

IN THE

Supreme Court of the United States

SOLOMON D. TESFAGABER,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a circuit court's decision to stay an alien's removal pending consideration of the alien's petition for review is governed by section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)—which provides that no court shall "enjoin" the removal of an alien unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law—as the court below and one other court of appeals have held, or whether that determination is instead governed by the traditional (and substantially less demanding) multifactor balancing test for stays and preliminary injunctive relief, as eight other courts of appeal have held.

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's request for a stay of removal (Pet. App. 1a) is unreported. The order of the Board of Immigration Appeals dismissing Petitioner's appeal (Pet. App. 2a–3a) and the decision and order of the Immigration Court denying his motion to reopen (Pet. App. 4a–10a) are also unreported.

JURISDICTION

Petitioner seeks review of an interlocutory order of the court of appeals before entry of judgment in that court. The order was entered on November 12, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252, which provides in relevant part:

(b)(3)(B) Stay of order

Service of the petition [for review] . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

. . . .

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the

action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

STATEMENT OF THE CASE

Petitioner seeks review of the Fourth Circuit's denial of his motion for a stay of removal pending disposition of his petition for review of an order of the Board of Immigration Appeals ("BIA" or "Board"). The BIA order under review in the Fourth Circuit denied on procedural grounds Petitioner's motion to reopen the removal proceedings that resulted in an *in absentia* order of his removal. Petitioner's motion to reopen is premised upon, *inter alia*, a claim that he will be tortured if returned to Ethiopia, thus rendering his removal illegal under the Convention Against Torture ("CAT"), as implemented by federal law.

Petitioner is an ethnic Eritrean who was born and raised in Ethiopia. Pet. App. 11a. While living in Ethiopia from 1965 until approximately 1986, Petitioner was persecuted and tortured by government authorities on account of his Eritrean ethnicity and his family's political affiliation with the pro-independence opposition group, the Eritrean Liberation Front. *Id.* On account of these affiliations and supposed wrongs against the ruling regime, Petitioner was frequently detained without charges by Ethiopian authorities. Pet. App. 12a. In one instance, he was arrested for not participating in pro-Ethiopian political activities, and during the ensuing detention was whipped to such an extent that he required hospitalization following his release. *Id.* On another occasion, he was detained in a tiny cell without a bed for two weeks as part of a government round up of Eritreans in retaliation for an Ethiopian military defeat at the hands of Eritrean forces. *Id.* During this detention, government officials savagely beat Petitioner into unconsciousness. *Id.* Once, Petitioner was fired upon by Ethiopian soldiers and was fortunate to escape with his life. *Id.* Petitioner's father and five siblings also suffered abuse at the hands of the Ethiopian regime. Pet. App. 11a. As a result of this persecution, Petitioner's five siblings were each granted asylum or similar status in the United States, Canada or Italy. *Id.*

In September 1986, Petitioner entered the United States via Greece as a refugee from Ethiopia. Pet. App. 12a–13a. While in the United States, Petitioner attended college, worked a steady job, paid taxes on a

timely basis and assisted in the care of family members. Pet. App. 13a. In 1995, Petitioner entered an *Alford* plea to charges of conspiracy to possess cocaine with intent to distribute and was sentenced to three years, all but 139 days of which were suspended. Pet. App. 13a–14a. Although Petitioner maintains his innocence, *id.*, he was, as a result of this conviction, detained and placed into removal proceedings in approximately June 1999. Pet. App. 14a.

In December 1999, Petitioner appeared without counsel in Immigration Court in Baltimore for a removal hearing. *Id.* Despite being present in the courtroom, Petitioner did not hear his case called and was told at the end of the hearing that he had been ordered removed *in absentia*. *Id.* At the instruction of the Immigration Judge, Petitioner immediately sought assistance from the clerk of the Immigration Court. *Id.* The clerk helped Petitioner file a motion to reopen, but failed to properly instruct him on service of the motion, causing Petitioner to mistakenly serve the Immigration Judge's clerk rather than counsel for the government. *Id.* Based solely on this procedural defect, the court denied the motion. Upon learning of this problem, Petitioner diligently attempted to remedy the error by re-filing the motion to reopen, but was told that he was not permitted to do so. *Id.* Petitioner therefore believed that his opportunity to reopen his removal proceedings was foreclosed.

Unbeknownst to Petitioner, on March 22, 2001, the Board of Immigration Appeals overruled the Immigration Judge's denial of the motion to reopen and ordered the removal proceedings reopened. Pet. App. 7a. Neither Petitioner nor the undersigned counsel learned of this order or the subsequent hearing until after the filing of the motion to reopen that is the subject of the instant proceedings. *See* Mot. Stay of Removal at 4 n.3.

On March 28, 2001, the Immigration Court mailed a notice to appear for a hearing to Petitioner. Pet. App. 7a. Notice was sent to Petitioner's permanent address at St. Michael's Circle in Odenton, Maryland. Pet. App. 2a. This address is the home of Petitioner's sister, with whom he maintains a residence to this day. Pet. App. 3a, 13a. At the time the hearing notice was sent, however, Petitioner was temporarily absent (Pet. App. 3a) as a result of a domestic dispute with his sister. *See* Mot. Stay Removal at 3–4 & n.3. Petitioner's sister returned the notices to the Immigration Court Pet. App. 7a.

On June 13, 2001, the Immigration Court held a removal hearing in Petitioner's case, but Petitioner was not present due to lack of notice. *Id.* As a result, the Immigration Judge ordered Petitioner removed *in absentia*. *Id.*

In August 2007, Petitioner was taken into custody by Immigration and Customs Enforcement. *Id.* In March 2008, Petitioner, still proceeding without the assistance of counsel, unsuccessfully attempted to file another motion to reopen. *Id.* Then, in June 2008,

the undersigned counsel was retained to assist Petitioner on a *pro bono* basis. Counsel filed a motion to reopen along with a motion for stay of removal. *Id.* Emphasizing that Petitioner had never been heard on the merits, counsel sought a hearing on, *inter alia*, Petitioner's claim that his removal is prohibited by the Convention Against Torture ("CAT" or "Convention"), as implemented by 8 C.F.R. § 208.16(c)(2). *Id.* In support, counsel submitted a declaration by Petitioner that detailed his past persecution in Ethiopia and the substantial grounds for believing that Petitioner, as an ethnic Eritrean, will be subjected to torture if removed to Ethiopia. Pet. App. 11a–15a.

Without holding a hearing or allowing counsel to present evidence, the Immigration Judge denied Petitioner's motions as procedurally barred and (in the alternative) on the ground that, notwithstanding his unrebutted declaration, Petitioner had "presented no independent evidence" in support of his CAT claim. Pet. App. 9a–10a. Petitioner appealed to the BIA, challenging both conclusions.

On October 1, 2008, the BIA dismissed Petitioner's appeal of the Immigration Judge's ruling in a one-paragraph order. Pet. App. 2a. The Board did not address whether Petitioner had presented sufficient evidence in support of his CAT claim. Pet. App. 2a–3a. Regarding the Immigration Judge's procedural holding, the Board acknowledged that "there is evidence in the record to support the fact that when the [2001] hearing notice was sent, [Petitioner]

temporarily was not living at [his address of record]" and therefore did not receive the notice. Pet. App. 3a. The Board noted, however, that "[Petitioner] does not claim that he filed a proper notice of a new address." *Id.* The Board therefore concluded that the Immigration Judge's denial of the motion to reopen on procedural grounds was proper. *Id.*

Petitioner filed a petition for review of the BIA's order with the Fourth Circuit on October 9, 2008, along with a motion for a stay of removal pending that court's consideration of the petition for review. Although Petitioner raised and preserved the issue of the proper standard for the issuance of a stay of removal, both parties assumed in their briefing that the Fourth Circuit would follow its new precedent, *Teshome-Gebreegziabher*, 528 F.3d 330 (4th Cir. 2008), *reh'g en banc denied*, No. 08-1060, 2008 WL 4741721 (4th Cir. Oct. 30, 2008), and apply the stringent standard of review set forth in section 242(f)(2) of the INA.

On November 12, 2008, a panel of the Fourth Circuit denied Petitioner's motion for stay of removal pending consideration of his petition for review. Pet. App. 1a. Although the court's order did not expressly cite section 242(f)(2), the parties (as noted) had litigated the propriety of the stay under that section and the government had proffered no alternative basis for decision. In addition, the order was issued just thirteen days after the court denied rehearing en banc in *Teshome-Gebreegziabher*. *See* 2008 WL 4741721, at *1. The panel in this case was keenly

aware of that decision, given that all three judges had authored or joined an opinion respecting that denial of rehearing and discussing in detail the applicability of section 242(f)(2) to stay requests. *Id.*; *see also Bell v. Cone*, 543 U.S. 447, 456 (2005) ("absent an affirmative indication to the contrary," the Court "presume[s]" that courts follow their own precedent).

REASONS FOR GRANTING THE PETITION

This case presents the question whether section 242(f)(2) of the INA supplies the standard governing the issuance of a stay of removal pending an alien's petition for review of a BIA order. Section 242(f)(2) provides that no court shall "enjoin" the removal of an alien absent clear and convincing evidence that removal is prohibited as a matter of law. The Fourth Circuit (in this case and others) and the Eleventh Circuit read the word "enjoin" in section 242(f)(2) to encompass the issuance of a stay pending judicial review. In contrast, eight other Circuits reject the applicability of section 242(f)(2) to stay applications, and instead apply the traditional (and substantially less demanding) multifactor balancing test for stays and preliminary injunctive relief.

This Court should grant the petition because the question presented is an important and recurring one on which the circuit courts are hopelessly divided. Justice Kennedy has previously opined—when the circuit split was far less pronounced than it is today—that the question presented warrants the Court's review in an appropriate case. This is such a

case because the Fourth Circuit's choice of standard likely affected the outcome of Petitioner's request for a stay. Moreover, as in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), because the question presented involves "the appropriate standard for granting or denying a stay . . . pending disposition of [a case on the merits] by a federal court of appeals," certiorari before the court of appeals renders final judgment is both appropriate and necessary.

I. THE FEDERAL COURTS ARE DEEPLY DIVIDED ON THE IMPORTANT QUESTION WHETHER SECTION 242(F) GOVERNS THE ISSUANCE OF STAYS OF REMOVAL PENDING JUDICIAL REVIEW OF BIA ORDERS

The question presented is which of two competing standards controls a circuit court's determination whether to stay an alien's removal pending consideration of the alien's petition for review of a BIA order. Before 1996, most removable aliens were entitled to automatic stays of their removal orders pending circuit-court review of those orders. *See* INA § 106, 8 U.S.C. § 1105a(a)(3) (repealed 1996). That changed with enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the INA to provide that the filing of a petition for review with the circuit court "does not stay the removal of [the] alien pending the court's decision on the petition, unless the court orders otherwise." INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). Section 242(b)(3)(B) does

not, however, specify the standard that a court should use in deciding whether to grant a stay.

The United States has taken the position that a separate provision of the INA added by the IIRIRA, namely section 242(f), 8 U.S.C. § 1252(f), provides the applicable standard. That subsection, entitled "Limit on injunctive relief," contains two subparts. The first subpart restricts the availability of class-action and pre-enforcement injunctions in the immigration context by providing that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the [immigration laws], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." INA § 242(f)(1), 8 U.S.C. § 1252(f)(1). The second subpart, in turn, provides a standard for injunctions in the case of an individual against whom enforcement proceedings have been initiated: "[N]o court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." INA § 242(f)(2), 8 U.S.C. § 1252(f)(2).

With four judges dissenting from the denial of rehearing en banc, the Fourth Circuit recently joined the Eleventh Circuit in adopting the government's position and concluding that section 242(f)(2) provides the standard for a stay pending circuit-court review of a BIA order. *See Teshome-Gebreegziabher*, 528 F.3d at 332–35, *reh'g en banc denied*, 2008 WL

4741721, at *1; *Weng v. U.S. Att'y Gen.*, 287 F.3d 1335, 1336–40 (11th Cir. 2002). These courts have reasoned that "'stay' is a subset of the broader term 'enjoin'"; that "it is a 'kind of injunction' directed at a judicial case or proceedings within it"; and that section 242(f)(2) therefore applies to requests for stays pending review. *Teshome-Gebreegziabher*, 528 F.3d at 333; *accord Weng*, 287 F.3d at 1338.

By contrast, eight circuit courts have rejected the reasoning of the Fourth and Eleventh Circuits and have held instead that an alien's request for a stay is governed by the traditional multifactor test for stays and preliminary injunctive relief, pursuant to which a court measures and balances the applicant's likelihood of success on the merits, the respective hardships to the parties, and the public interest. *See Tesfamichael v. Gonzales*, 411 F.3d 169, 171–76 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482, 483–85 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230, 233–34 (3d Cir. 2004); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 6–9 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95, 98–100 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 687–89 (6th Cir. 2001); *Andreiu v. Ashcroft*, 253 F.3d 477, 480–83 (9th Cir. 2001) (en banc). These courts take the position that stays and injunctions are distinct legal concepts and that the issuance of a stay for the duration of an alien's petition for review therefore does not "enjoin" the alien's removal within the meaning of section 242(f)(2).

Justice Kennedy opined on the necessity of resolving this circuit split—at a time when just four circuits had considered the matter—in his in-chambers opinion in *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–05 (2003). He observed then that "[t]he courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views." *Id.* at 1304. Since *Kenyeres*, the split has only deepened, with several of the nation's circuit judges rendering additional comprehensive and well-reasoned opinions on both sides of the issue. Moreover, the Eleventh Circuit's ruling is no longer just an early outlier. The Fourth Circuit's decision to adopt the minority view is the most recent ruling in this area, and that court, in the face of contrary authority from eight of its sister Circuits, firmly rejected a request to reconsider the holding en banc. *See Teshome-Gebreegziabher*, 2008 WL 4741721, at *1–4 (Shedd, J., concurring in the denial of rehearing en banc); *see also id.*, 2008 WL 4741721, at *4–9 (Michael, J., dissenting from the denial of rehearing en banc).

As Justice Kennedy further noted, "[t]he issue is important" because the "opportunity to present one's meritorious grievances to a court"—which might be lost if an excessively stringent standard is applied to stay applications—"supports the legitimacy and public acceptance of a statutory regime," "particularly . . . in the immigration context." *Id.* at 1305. This is especially so where, as here, "[a]pplying a heightened burden of proof to temporary stays of deportation will have a unique effect on a great

number of litigants." *Dorelien v. U.S. Att'y Gen.*, 1325 (11th Cir. 2003) (Barkett, J.) (dissenting from denial of rehearing en banc). In the Fourth and the Eleventh Circuits, all but an infinitesimally few number of aliens will be subject to removal pending judicial review of the merits of their claims. *See Hor*, 400 F.3d at 483. Many of these aliens may be subject to persecution or torture upon their removal to the designated country. And although the INA allows aliens to continue to litigate certain claims from abroad, and to return to the United States if victorious, this right "would not be worth much if the alien has been maimed or murdered in the interim." *Id.* at 485.

Because the heightened standard of review is all but insurmountable, and the repercussions may be life-threatening, Justice Kennedy's conclusion in *Kenyeres* holds true today: "Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court . . . should examine ε ıd resolve the question in an appropriate case." 538 U.S. at 1305.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

Kenyeres was not an appropriate case for certiorari in Justice Kennedy's view because the alien there was unlikely to prevail in his request for a stay under either of the competing standards. *Id.* This is an appropriate case, by contrast, because the Fourth Circuit's application of section 242(f)(2) led to the denial of a stay that would have been warranted

under the less demanding multifactor balancing test. *See Kenyeres*, 538 U.S. at 1306–07 ("[m]y assessment likely would be different in a case where the choice of [the] standard applicable to a request for a stay *could influence* the outcome" (emphasis added)).

For one thing, in applying section 242(f)(2), the Fourth Circuit was prohibited from taking into account three of the four traditional elements, each of which strongly counsels in favor of a stay in this case. There is no question that Petitioner will suffer irreparable harm if he is removed to Ethiopia: he will arguably lose all opportunity for judicial review of the denial of his motion to reopen because once an alien leaves the United States, "pursuant to regulation, the motion to reopen will be deemed withdrawn." *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008); *accord* 8 C.F.R. § 1003.2(d) ("[a]ny departure from the United States, including the deportation or removal of a person . . . occurring after the filing of a motion to reopen or a motion to reconsider, *shall constitute a withdrawal of such motion*" (emphasis added)); *see also Alimi v. Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) (alien's loss of "all possibility of judicial review" constitutes "irreparable injury"). *But see William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007) (holding 8 C.F.R. § 1003.2(d) invalid).

Even more importantly, Petitioner will likely be tortured if returned to Ethiopia. As set forth in his uncontroverted declaration, Pet. App. 11a–15a, when he lived in Ethiopia, Petitioner was, because of his ethnicity and political beliefs, the victim of arbitrary

arrests and detentions, beatings and attempted murder, all perpetrated by the Ethiopian government. *See supra* pp. 2–3.[1] In addition, as a result of ongoing tensions between Ethiopia and Eritrea, which obtained independence from Ethiopia in 1993 after a war of almost thirty years, the Ethiopian regime continues to engage in the unlawful killing, beating, abuse, mistreatment, and arbitrary arrest and detention of ethnic Eritreans. *See* U.S. Dep't of State, *2007 Country Reports on Human Rights Practices, Ethiopia* (2008). This ongoing tension and simmering conflict between the two nations creates a significant risk of harm for someone like Petitioner, who will be considered an enemy to Ethiopia's ruling party and will be a prime target for torture and detention. *See id.*

As courts have recognized, the physical and psychological injuries from torture are irreparable harms that can never be fully redressed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Hor*, 400 F.3d at 485. Moreover, this grievous and irreparable harm far outweighs the "lesser 'injury' to the Government" of permitting Mr. Tesfagaber, who

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[1] Such "personal prior detention and physical abuse at the hands of the [government]," as well as the "physical abuse . . . of [Petitioner's] family members" (*see* Pet. App. 11a), are precisely the kind of circumstances that "establish *prima facie* eligibility under CAT." *Kay v. Ashcroft*, 387 F.3d 664, 675 (7th Cir. 2004); *see also Woldemichael v. Gonzales*, 197 F. App'x 712, 714 (9th Cir. 2006) ("[d]etention, beatings, and threats of death by [Ethiopian] government officials because of his Eritrean heritage are sufficient to establish past persecution").

has lived in the United States for more than two decades, to remain here for a few extra months pending appeal. *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002). And a stay of removal also serves the public good of ensuring that the United States complies with its treaty obligations and does not inappropriately send an alien to a regime in which he will be tortured without ever giving that alien a single opportunity to be heard on the merits of his CAT claim. *See Khouzam v. Hogan*, 497 F. Supp. 2d 615, 627 (M.D. Pa. 2007).

Just as significantly, although Petitioner was unable (to the circuit court's satisfaction) to demonstrate "by clear and convincing evidence" that his removal is "prohibited as a matter of law," Petitioner nevertheless can also satisfy the fourth element of the traditional standard by demonstrating (as shown below) a high likelihood of success on the merits of his petition for review. There is, of course, nothing incongruous about this situation. As several courts have recognized, aliens with meritorious claims will often find it difficult to satisfy the requirements of section 242(f)(2). *See, e.g.*, *Hor*, 400 F.3d at 483 ("[a]s a practical matter, removal is 'prohibited by law' only when the person is a citizen of the United States or holds a visa of unquestioned validity"); *Arevalo*, 344 F.3d at 8 (noting that section 242(f)(2) would "require the alien to carry a burden of proof *higher* than she would have to carry on the merits"). This is especially so in a case like this one, in which the alien's principal argument is that equitable considerations require the tolling or

suspension of certain procedural bars to relief. Such equitable relief excuses strict compliance with legal requirements; by definition, then, removal in the face of equitable considerations is not "prohibited as a matter of law."

Regarding his likelihood of success on the merits, *first*, Petitioner is likely to succeed on his argument that the BIA should have granted the motion to reopen because the Petitioner lacked notice of the hearing that resulted in the *in absentia* order of removal. Binding circuit precedent holds that the Board should grant a motion to reopen a hearing that resulted in an *in absentia* removal order if the alien can prove that he did not receive notice of the hearing. *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006) (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)); *see also Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156, 158–60 (2d Cir. 2008) (collecting cases). Here, it is undisputed that Petitioner did not receive actual notice of the 2001 removal hearing that resulted in the outstanding *in absentia* removal order: as the Immigration Judge found, the notices of that hearing "were returned to the [Immigration] Court by an individual who appear[ed] to live at" Petitioner's St. Michael's Circle address and who told the Immigration Court that "she [was] not able to contact" Petitioner. Pet. App. 7a. This individual was Petitioner's sister, and when the notice was mailed, Petitioner had temporarily moved from her home, Pet. App. 3a, as the result of a domestic dispute. *See* Mot. Stay Removal at 3–4 & n.3.

Nor is there merit to the Board's contention that the motion to reopen should be denied because Petitioner failed to notify the immigration authorities that he had moved from the St. Michael's Circle address. As the BIA noted, Petitioner's departure was "temporar[y]," and he "has . . . used [that address] since that time," including in connection with his 2008 application for asylum. *Id.* While the INA does require "the alien . . . [to] provide the Attorney General immediately with a written record of any change of the alien's address," INA § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii), this provision does not require notice of temporary absences due to domestic circumstances. *See Santiago v. Att'y Gen.*, 216 F. App'x 232, 233–34, 236 (3d Cir. 2007) (per curiam) (alien moved from address of record to avoid spousal abuse).

Second, even if Petitioner's temporary move somehow constitutes a forfeiture of his right under the INA to a reopening for lack of notice, Petitioner is likely to succeed on the merits of his argument that equitable considerations nevertheless require the BIA to reopen his removal proceedings. Courts, including the Fourth Circuit, have held that procedural requirements in the immigration context should give way where "it would be unconscionable to enforce [those requirements] against the party and gross injustice would result." *Amegashie v. Gonzales*, 188 F. App'x 226, 227 (4th Cir. 2006) (per curiam) (internal quotation marks omitted); *see also Davies v. INS*, 10 F. App'x 223, 224 (4th Cir. 2001) (per curiam)

(holding procedural requirements equitably tolled given facts and circumstances of case).

As Petitioner argued in his motion for a stay, numerous considerations warrant equitable relief from the Act's procedural requirements in this case. Among these are Petitioner's prior *pro se* status, *see, e.g.*, *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001); *Sembiring v. Gonzales*, 499 F.3d 981, 990 (9th Cir. 2007); the fact that Petitioner diligently attempted to comply with the immigration laws but was thwarted in his efforts to have his case heard by the immigration court's several errors (*supra* pp. 4–5) and by his sister (*supra* p. 5), *see, e.g.*, *Alrefae v. Chertoff*, 471 F.3d 353, 360 (2d Cir. 2006); *Tairova v. Gonzales*, 207 F. App'x 886, 887 (9th Cir. 2006); and the fact that Petitioner has never had a hearing on the merits of his claims even though, as discussed above, his uncontested declaration establishes a likelihood of torture should he be returned to Ethiopia. Given these circumstances, Petitioner is likely to convince the reviewing court that the decision to remove him to Ethiopia without a hearing would be "unconscionable" and a "gross injustice," *Amegashie*, 188 F. App'x at 227, and therefore to exercise its equity jurisdiction to require the BIA to excuse any procedural bars that might stand in the way of Petitioner's motion to reopen.

Third, these same equitable considerations also entitle Petitioner to a reopening of his removal proceedings pursuant to section 240(b)(5)(C)(i) of the INA, 8 U.S.C. § 1229a(b)(5)(C)(i), which provides for

reopening "if the alien demonstrates that the failure to appear was because of exceptional circumstances." The circumstances described above, all of which were "beyond the control of" Petitioner, INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1), certainly qualify as exceptional. Moreover, although the INA requires a motion under this subsection to be filed within 180 days after the date of the order of removal, that procedural requirement, too, is subject to equitable tolling. *See Amegashie*, 188 F. App'x at 227 (citing cases); *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005). The 180-day time limit should be equitably tolled here for all of the reasons discussed above, and also because Petitioner did not learn about the 2001 *in absentia* order until after he filed the instant motion to reopen. *See* Mot. Stay Removal at 4 n.3.

In sum, it is likely that Petitioner would have prevailed below in his motion for a stay under the traditional criteria by demonstrating a likelihood of success on the merits of his petition for review, irreparable harm if the stay were not granted, and a balance of equities tilting strongly in his favor. The Fourth Circuit's selection of the more demanding standard therefore likely changed the outcome below. As a result, this case is a particularly appropriate vehicle for resolving the question presented.

III. RESOLUTION OF THE QUESTION PRESENTED REQUIRES REVIEW OF AN INTERLOCUTORY ORDER

Although this Court does not regularly grant certiorari to review interlocutory orders of the courts

of appeals, it plainly has jurisdiction to do so. *See* 28 U.S.C. §§ 1254(1) & 2101(e). Moreover, this is the unusual case in which such review is warranted. The very issue on which the circuits are split is the standard for issuing that interlocutory order. And if certiorari is not granted prior to judgment on the merits by the court of appeals, that issue will evade review by this Court. In every case, once a court of appeals renders judgment on the underlying merits of a petition for review, the question whether the alien was entitled to an interim stay pending that decision will have become moot.

This case is therefore identical in all relevant respects to *Barefoot v. Estelle*, 463 U.S. 880 (1983). In *Barefoot*, the court of appeals denied a stay of execution pending its review of the merits of the habeas petitioner's appeal. The denial of the stay itself raised substantial legal questions requiring this Court's review. *See id.* at 888–96. Accordingly, the Court treated the petitioner's application for a stay as a petition for a writ of certiorari before judgment, and granted certiorari to review "the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals." *Id.* at 887.[2] Similarly, in *United Auto Workers v. Scofield*, this Court granted certiorari to

[2] In *Barefoot*, the Court simultaneously granted certiorari before judgment on the underlying merits of the petitioner's habeas petition. Petitioner here does not seek this Court's review of the merits of the BIA's ruling because the court of appeals is best positioned to consider those merits issues in the first instance.

review the standard governing the issuance by the court of appeals of an interlocutory order (the denial of a motion to intervene) and stayed further proceedings in the court of appeals until this Court's completion of that review. *See UAW, Local 283 v. Scofield*, 382 U.S. 205, 207 (1965).

In sum, where, as in *Barefoot*, *Scofield*, and this case, the standard governing the issuance by the courts of appeals of a class of interlocutory orders is the very question at issue, the Court must, if it is to review the question at all, grant certiorari before the case proceeds to judgment on the merits in the court of appeals.

IV. THE COURT BELOW APPLIED THE INCORRECT STANDARD

For several reasons, the Fourth Circuit erred below in interpreting section 242(f)(2) to apply to an alien's motion for a stay of removal pending merits review of an order of the BIA.

First, both history and common usage establish a difference between injunctions, which are expressly governed by section 242(f), and stays of judicial or quasi-judicial proceedings. As Judge Easterbrook has explained, the two concepts "cover different domains":

> An "injunction" is an order issued as the relief in independent litigation, while a "stay" is an order integral to a system of judicial review: an appellate court may stay a district judge's order, or its own mandate, or an agency's decision when the agency

> plays the role of the district court and the initial judicial tribunal is a court of appeals.

Hor, 400 F.3d at 484; *accord Tesfamichael*, 411 F.3d at 173 ("history and usage counsel that the two words carry different legal meanings"). "Treating a rule addressed to 'injunctions' as covering 'stays,'" Judge Easterbrook concluded, "would impoverish the language and make the legislative task more difficult. Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither . . . ." *Hor*, 400 F.3d at 484. Indeed, this Court has held in another context that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988).

The procedure employed by courts in connection with the issuance of stays of removal supports this interpretation. As Judge Michael noted:

> If [the circuit court] had agreed to the petitioner's request, a simple stay would have done the job. It would not have been necessary for [the court] to enjoin or restrain the Attorney General of the United States (the named respondent) individually. To turn a stay into an injunction in these circumstances is overkill, and it depreciates the traditional force of a simple stay, which assumes automatic respect for our orders without the need for formal restraint or prohibition of individual parties.

Teshome-Gebreegziabher, 2008 WL 4741721, at *6 (Michael, J., dissenting); *accord Andreiu*, 253 F.3d at 483 ("injunctions run against parties; stays run against courts and judgments").

The distinction between stays and injunctions is recognized in the very provisions governing the issuance of stays by the courts of appeals. Rule 8 of the Federal Rules of Appellate Procedure, entitled "Stay or Injunction Pending Appeal," recognizes a "stay" and an "injunction" as two separate and distinct legal orders, with the "stay" acting upon "the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A) & (C). And Rule 18, which applies to petitions for review of agency decisions, characterizes an order from the circuit court restraining enforcement of an agency decision or order as a "stay." Fed. R. App. P. 18. "It is noteworthy," in other words, "that rule 18 nowhere uses the word 'enjoin' or 'injunction' but maintains the linguistic distinction [recognized in Rule 8] by discussing 'stays'—a peculiar procedural medium." *Tesfamichael*, 411 F.3d at 174.

The structure and language of the IIRIRA confirms this understanding. For one thing, stays pending appellate review are specifically addressed in section 242(b)(3)(B) of the INA, 8 U.S.C. § 1252(b)(3)(B), which abrogates the pre-IIRIRA rule that such stays were, in most cases, automatic. "This provision, consequently, would have been the natural place to locate an amendment to the operative standard governing their issuance, but no such standard is

found [there]." *Tesfamichael*, 411 F.3d at 174. This silence is "deafening." *Id.*; *see also Andreiu*, 253 F.3d at 481 ("[i]t would be quite strange to announce the abolition of automatic stay orders in [one provision], but announce the replacement standards in [another]"). "[I]f Congress had wanted to break from the routine of the past and apply a heightened standard to stays pending appeal, it most likely would have included such a standard in INA § 242(b)(3) itself." *Arevalo*, 344 F.3d at 8. Indeed, if Congress had truly intended that a court could issue a stay only upon a showing that the order was "prohibited as a matter of law," there would have been "no need" to state in section 242(b)(3)(B) that stays are not automatic. *Tesfamichael*, 411 F.3d at 175–76 (internal quotation marks omitted); *accord Andreiu*, 253 F.3d at 481 (noting that if section 242(f)(2) has the effect the government claims, then "all of [section 242(b)(3)(B)] would be reduced to surplusage").

In addition, subsection (f)(1) refers to the authority of courts, in the class-action and pre-enforcement contexts, "to enjoin or restrain" the operation of the immigration laws. Subsection (f)(2), by contrast, uses only the term "enjoin," thus evincing a congressional recognition that injunctions do not include the entire universe of judicial restraints. "[T]his linguistic shift makes it appear likely that Congress intended the words 'enjoin' and 'restrain' to have different meanings," for otherwise "the use of the word 'restrain' in subsection (f)(1) would be pointless." *Arevalo*, 344 F.3d at 7; *see also Hor*, 400 F.3d at 485

("Title 8 as a whole refers to 'stay' 14 times . . . and 'enjoin' or 'injunction' a total of 7 times; these words are not treated as coterminous in any provision."). Congress would have understood that "the word 'enjoin' . . . refer[s] to permanent injunctions and the word 'restrain' . . . refer[s] to temporary injunctive relief (such as a stay)," a distinction found in the Hobbs Act, 28 U.S.C. § 2349(a) & (b), which is expressly incorporated in the INA. *Arevalo*, 344 F.3d at 7 (citing INA § 242(a)(1)).

The practical consequences of applying section 242(f) to temporary stays pending review also counsel against doing so. As several circuits have recognized, "the adoption of the standard [set forth in section 242(f)] would render stays of deportation almost impossible to obtain." *Tesfamichael*, 411 F.3d at 173; *accord Hor*, 400 F.3d at 483. Whether or not this is an "absurd result[]," *Andreiu*, 253 F.3d at 482, it is at least a peculiar one. It would, for example, "require full-scale briefing at the beginning of the appellate process, often before the petitioner has even received a copy of the administrative record." *Id.* at 482. As Judge Selya observed, applying section 242(f) to stays would prematurely "necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof *higher* than she would have to carry on the merits." *Arevalo*, 344 F.3d at 8. The inevitable result would be "the removal of some aliens with meritorious claims against removal." *Mohammed*, 309 F.3d at 100.

For all of these reasons, section 242(f)(2) is inapplicable to requests for stays pending judicial review of BIA orders. Accordingly, the court below applied the incorrect standard to Petitioner's motion for a stay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 2008

APPENDIX

FILED: November 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2118
(A0206-809-010)

SOLOMON DEBESSAY TESFAGABER,
Petitioner

v.

MICHAEL B. MUKASEY, Attorney General,
Respondent

ORDER

Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.

Entered at the direction of Judge Shedd with the concurrence of Chief Judge Williams and Judge Michael.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A026-809-010 – Baltimore, MD Date: 10/1/08

In Re: TESFAGABER, SOLOMON DEBESSAY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Parcher, Laura Tuell, Esquire

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated June 30, 2008. In that decision, an Immigration Judge denied the respondent's motion to reopen and stay removal, because the respondent had not provided evidence that he received inadequate notice of the June 13, 2001 hearing, which the respondent failed to attend and which, accordingly, resulted in an in absentia order of removal. As background, we note that the respondent previously was ordered removed in absentia on December 12, 1999. In a March 22, 2001, order, we sustained the respondent's appeal of the Immigration Judge's denial of his motion to reopen, reopened proceedings, and remanded the record. On remand, despite the proper service in March 2001 by regular mail of a hearing notice to the respondent's last address of record on St. Michael's Circle in Odenton, Maryland, the respondent claims that he did not receive the notice because he was not living

there at the time the notice was sent. He argues he only became aware of the June 2001 in absentia order against him in 2007 when he was apprehended by the Department of Homeland Security. See Motion to Reopen at Exh. B. Although there is evidence in the record to support the fact that when the hearing notice was sent, the respondent temporarily was not living at the St. Michael's Circle address, there is no contention that the respondent notified the DHS or the Immigration Court of a new address, as required under the terms of the Notice to Appear. We also note that despite the contention that the respondent was not living on St. Michael's Circle in Odenton at the time of the June 2001 hearing, this address was used prior to that time in the respondent's pro se filings on appeal and has been used since that time in his current (March 2008), Application for Asylum. See Motion to Reopen at Exh. D. Because the respondent does not claim that he filed a proper notice of a new address (despite the fact that the respondent's prior in absentia order of removal rendered him keenly aware of the dire consequences of failing to appear), the Immigration Judge's denial of the motion to reopen was proper. Accordingly, the appeal is dismissed.

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF:	)
	)
TESFAGABER, Solomon	)
	)
RESPONDENT	)
	)
IN REMOVAL PROCEEDINGS	)
	)
File #: A26-809-010	)

CHARGE:

INA § 237(a)(2)(A)(iii), as amended, in that, at any time after admission, the Respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

INA § 237(a)(2)(B)(i), as amended, in that, at any time after admission, the Respondent was convicted of a violation of (or a conspiracy or attempt to violate)

any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

APPLICATION: Motion to Reopen and Stay Deportation

APPEARANCES

ON BEHALF OF RESPONDENT:
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Jones Day
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Washington DC 20001

ON BEHALF OF THE DHS:
Brian M. Fish, Esq.
Assistant Chief Counsel
31 Hopkins Plaza,
7th Floor
Baltimore, MD 21201

DECISION AND ORDER ON RESPONDENT'S MOTION TO REOPEN AND MOTION TO STAY DEPORTATION

I. PROCEDURAL HISTORY

Respondent is a native and citizen of Ethiopia. He was admitted to the United States on September 26, 1986. In 1999, Respondent was served with a Notice to Appear ("NTA"). The NTA alleges that: (1) Respondent is not a native or citizen of the United States; (2) Respondent is a native of Ethiopia and a citizen of Ethiopia; (3) Respondent was admitted to the United States at New York, Now York on or about September 26, 1986 as a refugee; (4) On October 13, 1993, his status was adjusted to that of a lawful permanent resident as of September 26, 1986; (5) He was, on April 21, 1995, convicted in the Circuit Court for Howard County, Maryland for the offense of Possession of Cocaine, a controlled substance, in violation of Article 27, Section 287 of the Annotated Code of Maryland; and (6) He was, on September 21, 1995, convicted in the Circuit Court for Prince George's County, Maryland, for the offense of Conspiracy to Possess Cocaine with Intent to Distribute, in violation of the Common Law of Maryland. As such, Respondent was charged with removability pursuant to **INA § 237(a)(2)(A)(iii)** and **INA § 237(a)(2)(B)(i)**.

In a decision dated December 12, 1999, this Court ordered Respondent removed for failing to timely appear at a hearing on December 1, 1999. Respondent appealed, asking the Board of Immigration Appeals ("BIA") to rescind the in absentia order of removal. He claimed that he was present in the courtroom and did not hear his case

being called. On March 22, 2001, the BIA ordered the record reopened and remanded the case to this Court based on evidence submitted by Respondent.

On March 28, 2001, Respondent was mailed notification that a Master Calendar hearing was scheduled for June 13, 2001. These notices were returned to the Court by an individual who appears to live at Respondent's former address. She notified the Court that he no longer lives at that address, and that she is not able to contact him. On June 13, 2001, Respondent failed to appear at the scheduled hearing and was again ordered removed in absentia.

Respondent was taken into custody by Immigration and Customs Enforcement on August 2, 2007. In March 2008, Responded filed a *Motion to Reopen*, which was rejected by this Court for failing to comply with several Local Operating Procedures. On June 12, 2008, Respondent filed an additional *Emergency Motion to Reopen and Motion to Stay Deportation* with this Court, as well a Form I-589 Application for Asylum and Withholding of Removal. Respondent's Motions also indicate that he is seeking protection under the United Nations Convention Against Torture ("CAT"). On June 24, 2008, the Department of Homeland Security ("DHS") filed its *Opposition* to Respondent's Motions.

The Court has considered these documents, as well as all evidence submitted by both parties. The Court's decision and order now follow.

II. DOCUMENTARY EVIDENCE PRESENTED

Emergency Motion to Reopen and Motion to Stay Deportation

A. Declaration of Respondent

B. Form I-589, Application for Asylum and Withholding of Removal
C. Motion to Reopen, Returned April 8, 2008
D. Department of State Country Report on Ethiopia
E. Department of State Country Report on Eritrea
F. Central Intelligence Agency World Fact Book: Eritrea
G. News Articles on the Ethiopian-Eritrean Conflict
H. Statements of Respondent
I. Reports, Circuit Court of Maryland
J. Application for a Stay of Deportation or Removal
K. Case law

II. STATEMENT OF LAW AND FINDINGS OF THE COURT

The Court has considered the entire record carefully, and all of the evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court shall deny Respondent's *Emergency Motion to Reopen and Motion to Stay Deportation.*

Generally, only one motion to reopen may be filed before the Immigration Court and such motion must be tiled within 90 days of the entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1). The motion must state new facts that will be proven at a hearing if the motion is granted, and it must be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence offered is material and was not available and could not have been discovered or presented at the former hearing. *Id.*; *see also Zhao v. U.S. Dept. of Justice*, 265 F.3d 83 (2d Cir. 2001)

(stating that a motion to reopen must be supported by new evidence; a motion that is based upon an error of law or fact in the original decision is treated as a motion to reconsider). Additionally, any motion to reopen for the purpose of applying for relief from removal, deportation, or exclusion must be accompanied by the appropriate application for relief and all supporting documents. *Id.* Finally, the Immigration Judge has discretion to deny a motion to reopen even if the moving party demonstrates *prima facie* eligibility for relief. *Id.*

Respondent's *Emergency Motion to Reopen and Motion to Stay Deportation* is denied for the following reasons. First, Respondent was already granted the opportunity to renew his case before this Court by the BIA, following the first in absentia removal order. However, Respondent again failed to appear before the Court on June 13, 2001. Respondent also failed to comply with his obligation to notify the Court of any change in address, though he was informed of this obligation in the 1999 NTA. *See* 8 C.F.R. § 1003.15(d)(2). There is no notice issue in this case. The Court mailed the hearing notice to the address Respondent used in his appeal to the BIA.

The Court has also considered Respondent's applications for Withholding of Removal and protection under the CAT, and supporting documentation. Respondent has been present in the United Slates since 1986, and has had ample opportunity to present these claims. The Court notes that 7 years passed between the issuance of the NTA and the present Motions, during which time Respondent never came forward with the alleged claims for relief. Furthermore, Respondent presented

no independent evidence of past persecution or torture in either Ethiopia or Eritrea, nor has he presented any evidence supporting a claim that he is likely to be persecuted or tortured in either country in the future. The Court recognizes that human fights conditions in Ethiopia and Eritrea are generally poor. *See* Exhibits D and E. However, Respondent has not demonstrated prima facie eligibility for relief. Finally, the aggravated felony drug crimes Respondent was convicted of in 1999 preclude the Court from granting him either asylum or withholding of removal, and limit the availability of relief under CAT.[2] INA § 208(b)(2)(A)(ii); 8 C.F.R. 1208.13(c)(1); INA § 241(b)(3)(B)(ii).

For the aforementioned reasons, Respondent's *Emergency Motion to Reopen and Motion to Stay Deportation* is denied.

II. ORDER

It is hereby ordered that *Respondent's Emergency Motion to Reopen and Motion to Stay Deportation* is **DENIED**.

June 30, 2008
Date

/s/ Bruce M. Barrett
Bruce M. Barrett
United States Immigration Judge
Baltimore, Maryland

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[2] An alien who is barred from withholding under CAT but who demonstrates that he is entitled to protection under CAT shall be ordered removed, but his removal shall be deferred until such time as the deferral is terminated under 8 C.F.R. § 1208.17.

DECLARATION OF SOLOMON TESFAGABER

I, Solomon Tesfagaber, state as follows:

1. I was born on July 27, 1965 in Asmara, Eritrea in Ethiopia.
2. I am currently being detained at the Howard County Detention Center in Jessup Maryland.
3. I first arrived in the United States in September, 1986. I was a refugee and I arrived through Greece. Due to the emergency nature of my escape from Ethiopia and Eritrea, I do not have a valid passport. Shortly after my arrival I adjusted my status to that of a Legal Permanent Resident.
4. I fled Ethiopia because I had suffered persecution at the hands of the government and I feared future persecution. The persecution I suffered was on account of my Eritrean ethnicity and my actual and imputed political opinions.
5. My father was politically active and supported Eritrean independence. He was detained numerous times and suffered physical harm at the hands of the Ethiopian government because he was Eritrean and because of his political opinions and actions.
6. My five siblings that also fled Ethiopia were also detained numerous times and suffered persecution because they are Eritrean and because of their actual and imputed political opinions. All five of my siblings escaped from Ethiopia and have asylum or a similar status. One lives in the U.S., one in Italy and the rest in Canada.

7. While in Ethiopia and Eritrea I personally suffered much persecution at the hands of the Ethiopian government. I was repeatedly targeted and detained because I am Eritrean and because I supported Eritrean independence.

8. On two occasions I was detained for long periods of time and beaten severely. On the first occasion I was arrested for refusing to participate in political activities supporting the Ethiopian government. On that occasion I was whipped so badly that I required hospitalization. On the second occasion I was detained solely because I was Eritrean. The Ethiopian government had just suffered a defeat by the Eritrean forces and came to my town and rounded up Eritreans to punish them. I was one of many. I was held for approximately 14 days in a tiny cell with no bed or room to lay down. I was beaten severely with a stick until I lost consciousness. My mother brought me food every morning because there was no food in the jail. When I was released I could barely move for weeks and required medical treatment.

9. On another occasion I tried to escape Ethiopia and was shot at by military personnel. I feared for my life and considered myself lucky that I was not shot. I fell to the ground and was detained and questioned.

10. When I was approximately 17, I was forced to join the Ethiopian army. I did not want to join. But I was not given a choice. I was sent for training to prepare to fight in Ethiopia's defense. I did not want to fight. So I escaped out of Ethiopia to Greece. I was in Greece as a refugee

for just over two years before I was finally admitted to the United States.

11. When I arrived in the United States I was suffering from the torture, persecution, threats and harassment I suffered in Ethiopia. I later sought treatment for post traumatic stress disorder because of the trauma I experienced in Ethiopia.

12. While in the United States I have attended college and worked a steady job. I have paid taxes on a timely basis. I also spend time with my sister and her family who live in Maryland. For extended periods of time I have assisted in taking care of my sister's children. I attend church on a regular basis. I have worked hard to be a contributing member to society.

13. In 1995 I was associated with a woman who was using drugs and associated with others who were buying and selling drugs. I have never used drugs and I never participated in the purchase or sale of drugs. On one occasion I was with her when she attempted to sell drugs. She tried to get me to participate, but I refused.

14. One of the persons she was trying to deal with was an undercover police officer. I was arrested at this time and charged with drug offenses. The police officer pushed me to cooperate and assist with his undercover operation. I tried to help, but ultimately was too afraid of the consequences.

15. In 1995 I went to court regarding criminal charges having to do with conspiracy to distribute cocaine. My public defender convinced me to accept an Alford Plea, and told me I would

not be pleading guilty. The result was I was released from jail.

16. I later learned that even though I did not plead guilty, I was convicted of a felony and sentenced to three years. But the judge suspended all but the time I had already served, which was 139 days.

17. Because of this criminal conviction, the immigration service began deportation proceedings against me in approximately June of 1999. In December of 1999 I attended a hearing on my deportation case. I was present in the court room on the correct day, but I did not hear my case called. After the judge adjourned for the day I asked him about my case. He told me he had ordered me removed *in abstentia*.

18. The judge then told me I could file a motion to reopen my case. I talked to the Judge's clerk and she directed me to the court clerk. I then went straight to the court clerk. She assisted me in writing up a motion to reopen. She accepted what I completed and stamped it. She gave me a copy and I provided it to the Judge's clerk. I thought I had successfully filed my motion.

19. I learned later that the Court denied my motion because I had not properly served the government's lawyer. I thought by giving it to the Judge's clerk I had done that.

20. I went back in April of 2000 and tried to properly re-file my application with copies for the court and the government. The clerk of the court told me that I could not file another application. That I am only permitted to file one.

21. I was picked up again by ICE on approximately August 2, 2007 and have been in detention ever since. In March of 2008 I attempted to file another motion to reopen accompanied by an I-589 seeking relief under the Convention Against Torture and seeking Withholding of Removal. This filing was sent back for procedural defects.

22. I am very afraid that I will be tortured and persecuted if forced to return to Ethiopia. I am not Ethiopian, I am Eritrean. I am afraid that if forced to return to Ethiopia, the government will torture and persecute me both because I am Eritrean and because of my history of supporting Eritrean independence.

23. I am also afraid of being returned to Eritrea. I left and have never returned since I was 17. I have not registered with the independent government and I have not paid the 2% required tax. I did not anticipate ever returning to Eritrea.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: June 10, 2008 /s/ Solomon Tesfagaber
Solomon Tesfagaber

Supreme Court, U.S.
FILED
JAN 2 8 2009
OFFICE OF THE CLERK

117 (2)

No. 08-693

In the Supreme Court of the United States

SOLOMON DEBESSAY TESFAGABER, PETITIONER

v.

MARK FILIP, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in 8 U.S.C. 1252(f)(2), or instead by the traditional test for preliminary injunctive relief.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 2a-3a) and the immigration judge (Pet. App. 4a-10a) are unreported.

JURISDICTION

The order of the court of appeals was entered on November 12, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline judicial review of aliens' claims and expedite the removal of illegal aliens from the United States. See

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA made three amendments to the INA that are particularly relevant here.

First, IIRIRA modified a provision of the INA that previously had provided for an automatic stay of the enforcement of a removal order upon the filing of a petition for review in a court of appeals. As a result, the INA now provides that "[s]ervice of the petition [for judicial review] * * * *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a)(2), 110 Stat. 3009-608 (emphasis added) (enacting 8 U.S.C. 1252(b)(3)(B)).

Second, Congress repealed a provision of the INA that had barred further consideration of a petition for review following an alien's departure or removal from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a (1994)). Post-IIRIRA, therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2320 (2008).

Third, Congress enacted a new provision, which states that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." IIRIRA § 306(a)(2), 110 Stat. 3009-612 (enacting 8 U.S.C. 1252(f)(2)). That provision is at issue here.

2. Petitioner is a native and citizen of Ethiopia who was admitted to the United States in 1986 as a refugee.

Pet. App. 6a. In 1993, petitioner's status was adjusted to that of a lawful permanent resident. *Ibid.*

In 1995, petitioner was convicted of two drug offenses. On April 21, 1995, he was convicted of possession of cocaine in state court in Howard County, Maryland. Pet. App. 6a. On September 21, 1995, he was convicted of conspiracy to possess cocaine with the intent to distribute it in state court in Prince George's County, Maryland. *Ibid.*

As a result of his crimes, petitioner was charged with being removable from the United States. Pet. App. 4a-6a; see 8 U.S.C. 1227(a)(2)(A)(iii) (authorizing removal of any alien who has been convicted of an aggravated felony); 8 U.S.C. 1227(a)(2)(B)(i) (authorizing removal of any alien who has committed a violation of a controlled substance law, other than an offense involving possession of 30 grams or less of marijuana); see also 8 U.S.C. 1101(a)(43)(B) (defining "aggravated felony" to include a drug trafficking crime such as petitioner's).[1]

Although petitioner was served with a notice to appear, he failed to appear at his removal hearing. Pet. App. 6a. An immigration judge (IJ) therefore ordered him removed *in absentia*. *Ibid.*

3. Petitioner appealed to the Board of Immigration Appeals (Board), contending that he was present in the courtroom at his removal hearing but did not hear his name called. Pet. App. 6a-7a. The Board reopened petitioner's proceedings and remanded his case to the IJ. *Id.* at 7a.

Petitioner was mailed a notification of the date of his new removal hearing before the IJ. Pet. App. 7a. That

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[1] Petitioner apparently does not contest that he is removable as charged. See Pet. 4.

notification was sent to petitioner's home address of record, but the notification was returned to the immigration court "by an individual who appear[ed] to live" at that address. *Ibid.* Petitioner now asserts that the notification was returned by his sister, with whom he was estranged at the time of the remanded proceeding (although they now live together once again). Pet. 5; see 8 U.S.C. 1229(a)(1)(F)(ii) (requiring an alien to "immediately" provide written notification to the immigration court upon any change in his mailing address). Petitioner failed to appear at his scheduled removal hearing, and he was again ordered removed *in absentia*. Pet. App. 7a.

4. In August 2007, petitioner was taken into custody by Immigration and Customs Enforcement. Pet. App. 7a. In March 2008, petitioner filed a motion to reopen his removal proceedings, but it was rejected by the immigration court because it failed to comply with several local court operating procedures. *Ibid.* Petitioner filed a new motion to reopen, which was accompanied by a motion for a stay of a removal and an application for asylum, withholding of removal, and relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 7a.

The IJ denied petitioner's motion to reopen. Pet. App. 4a-10a. The IJ first explained that he "considered the entire record carefully," including "all of the evidence" petitioner submitted. *Id.* at 8a. He also noted that an alien generally is limited to only one motion to reopen, *id.* at 8a (citing 8 C.F.R. 1003.23(b)(1)); that the alien must provide "material" evidence that "was not available and could not have been discovered or pre-

sented at the former hearing" in order for the motion to be granted, *ibid.* (citing 8 C.F.R. 1003.23(b)(3)); and that the granting of a motion to reopen is discretionary, *id.* at 9a.

The IJ then denied the motion to reopen. He explained that petitioner "was already granted the opportunity to renew his case * * * following the first in absentia removal order," but he "failed to appear" and "failed to comply with his obligation to notify the Court of any change in address," even though he was specifically advised of that requirement in the initial notice to appear. Pet. App. 9a. The IJ also considered and rejected petitioner's claims for withholding of removal and CAT relief. *Id.* at 9a-10a.[2] The IJ observed that although petitioner has been present in the United States since 1986, and seven years passed between the issuance of the notice to appear and the present motion to reopen, petitioner had never before asserted his claims that he would be persecuted or tortured in Ethiopia. *Id.* at 9a. The IJ then determined that petitioner did not establish prima facie eligibility for relief because he presented no "evidence supporting a claim that he is likely to be persecuted or tortured in either" Ethiopia or Eritrea. *Id.* at 10a.

5. The Board dismissed petitioner's appeal. Pet. App. 2a-3a. It observed that, although petitioner had been ordered removed *in absentia* once before, and that removal order made him "keenly aware of the dire consequences of failing to appear," he nonetheless failed to

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[2] The IJ explained that petitioner was statutorily ineligible for asylum and withholding of removal because he had committed multiple aggravated felony offenses, so that the only possible relief available was deferral of removal under the CAT. Pet. App. 10a & n.2 (citing 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii); 8 C.F.R. 1208.13(c)(1)).

notify the immigration court of his change in address as required by his notice to appear. *Id.* at 3a. The Board also noted that, notwithstanding petitioner's contention that he did not live at his address of record at the time of the remanded proceedings, he used that address in his prior appellate filings with the Board and in his current motion to reopen and related filings. *Ibid.* The Board therefore concluded that the IJ properly denied the motion to reopen. *Ibid.*

6. Petitioner filed a petition for review with the court of appeals and sought a stay of removal pending consideration of the petition. In his stay motion, petitioner contended that he was entitled to a stay under the standard set forth in 8 U.S.C. 1252(f)(2), which is the standard that has been adopted by the Fourth Circuit. See *Teshome-Gebreegziabher* v. *Mukasey*, 528 F.3d 330, 332-335 (2008). He also contended, however, that the Fourth Circuit should revisit its precedent and evaluate his motion using the four-part standard for assessing requests for preliminary injunctive relief. Pet. Stay Motion 5-19. The government opposed the stay motion, arguing that petitioner did not meet the requirements for a stay of removal under 8 U.S.C. 1252(f)(2). Gov't Stay Opp. 7-14.

The court of appeals denied the stay motion in an unpublished, per curiam order, which reads:

> Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.

Pet. App. 1a.[3]

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[3] Petitioner filed his opening brief in the court of appeals on January 12, 2009.

DISCUSSION

In *Nken* v. *Filip*, No. 08-681 (argued Jan. 21, 2009), this Court is currently considering whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in 8 U.S.C. 1252(f)(2), or instead by the four-part standard traditionally used for preliminary injunctive relief. The petition in this case presents the same question. The Court therefore should hold the petition pending its decision in *Nken*, and then dispose of it accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Nken* v. *Filip*, 08-681, and then be disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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